TAJUKON SDN BHD

v.

MULPHA LAND BHD

HIGH COURT MALAYA, SHAH ALAM
NURCHAYA ARSAD J
[ORIGINATING SUMMON: 24-2855-12/2011]
16 FEBRUARY 2012

COMPANY LAW: *Winding up - Notice of demand - Setting aside - Change of company name - Whether changed identity of defendant as creditor - Non-compliance with s. 121(1A) Companies Act 1965 - Whether caused injustice towards plaintiff - Whether defendant entitled to present winding up petition against plaintiff - Whether winding up petition grounded on valid judgment - Whether complaints advanced by plaintiff unsustainable - Companies Act 1965, s. 218(2)(a)*

COMPANY LAW: *Winding up - Petition - Injunction to restrain further proceedings - Change of company name - Whether changed identity of defendant as creditor - Non compliance with s. 121(1A) Companies Act 1965 - Whether caused injustice towards plaintiff - Whether defendant entitled to present winding up petition against plaintiff - Whether winding up petition grounded on valid judgment - Whether complaints advanced by plaintiff unsustainable - Companies Act 1965, s. 218(2)(a)*

This was the plaintiff's application seeking for, *inter alia*, a declaration that the defendant had no locus to issue the notice of demand pursuant to s. 218 of the Companies Act 1965 ('the Act') and to set aside the notice of demand. Briefly, the facts were that summary judgment was granted against the plaintiff and its guarantors for RM600,658 being part of the defendant's claim against the plaintiff in a suit filed by the defendant ('the KL suit'). The plaintiff and its two guarantors applied and obtained a stay of execution of the summary judgment until after the hearing of the plaintiff's counterclaim. Subsequently, the High Court and the Court of Appeal dismissed the plaintiff and its guarantors' appeal against the summary judgment. The Federal Court also dismissed the plaintiff and its guarantors' motion for leave to appeal against the summary judgment. On 18 March 2011, the High Court Judge allowed the remaining of the defendant's claim against the plaintiff and its guarantors and had dismissed the plaintiff's counterclaim.

A On 11 November 2011, the defendant issued a notice of demand under s. 218(1)(e) of the Act ('the said notice') to demand for the payment of the judgment sum under the summary judgment and the said High Court judgment. The said notice was served on the plaintiff. The plaintiff filed this action by originating summons
B seeking declaratory reliefs. The plaintiff also applied and obtained an order to include the relief that the defendant was restrained from proceeding with the winding up petition.

Held (dismissing the application):

C
(1) The plaintiff had disputed the standing of the defendant as a creditor because there had been a change of identity of Megal Pascal Berhad to Mulpha Land Berhad. By virtue of s. 23(6) of the Act, the change of the name of Megal Pascal Berhad to Mulpha Land Berhad would not change the identity of the
D defendant as a creditor. Although the defendant had not complied with s. 121(1A) of the Act, and had not cited its new name in the documents filed in the KL Suit after its change of name, the non-compliance did not cause any injustice towards the plaintiff. It did not invalidate the winding
E up proceedings. (paras 6-9)

(2) Once the defendant had rightly proceeded to issue a statutory notice against the plaintiff pursuant to s. 218(2)(a) of the Act and upon the expiry of 21 days and the judgment debt
F remaining unpaid, the debt became "due and payable". The plaintiff was deemed to be unable to pay its debts. Therefore, the defendant was entitled as of right to present a winding up petition against the plaintiff. (para 12)

G **(3)** The winding up petition was grounded on a valid judgment and its execution had not been stayed. The plaintiff had the opportunity to apply for stay of execution of the judgment dated 18 March 2011 but had not done so. By electing not to do so, the plaintiff must be taken to have waived their
H rights to a stay of execution of 18 March 2011 judgment and they were therefore stopped from arguing that the enforcement of the judgment should be restrained pending the disposal of the appeal at the Court of Appeal. (para 14)

I

(4) The plaintiff claimed that it had shown substantial grounds for disputing the debt giving rise to *bona fide* disputes. A judgment sum remains due even though the debtor's appeal against the judgment is pending, because an appeal does not operate as a stay of execution. Therefore, the fact that an appeal was filed at the Court of Appeal merely meant that the plaintiff still disputed the debt but did not mean that the debt was *bona fide* disputed *(Bank Utama (Malaysia) Bhd v. GKM Amal Bhd)*. (paras 15 & 16)

(5) The winding up proceedings would not cause the plaintiff loss of reputation. Such fear could not be a ground to stay winding up proceedings *(Ming An Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd)*. Hence, the complaints advanced by the plaintiff were unsustainable and the application should be dismissed. (paras 20 & 21)

Case(s) referred to:

Bank Utama (Malaysia) Bhd v. GKM Amal Bhd [2000] 2 CLJ 525 HC ***(refd)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

People Realty Sdn Bhd v. Red Rock Construction Sdn Bhd [2008] 1 CLJ 632 CA ***(refd)***

RHB Bank Bhd v. Gunasingam Ramasingam [2002] 5 CLJ 544 HC ***(refd)***

Zalam Corporation Sdn Bhd v. Dolomite Readymixed Concrete Sdn Bhd [2011] 9 CLJ 705; [2011] 1 LNS 1021 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 23(6), 121(1A), 218(1)(e), (2)(a)

Rules of the High Court 1980, O. 92(4)

For the plaintiff - Amarjeet Singh (Avtar Sing with him); M/s Zubeda & Amarjeet

For the defendant - Frank Wong; M/s Liza Chan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Nurchaya Arsad J:

The Application

[1] This is an application by the plaintiff, seeking:

(a) A declaration that the defendant has no locus to issue the notice of demand pursuant to s. 218 of the Companies Act 1965 dated 11 November 2011;

(b) To set aside the notice of demand;

(c) An injunction that the defendant is restrained to proceed with the winding-up petition.

Background Facts

[2] In the Kuala Lumpur Civil Suit No. 22-3436-1998 (hereinafter referred as the KL suit), the defendant has filed a suit against the plaintiff and its two guarantors (who are also its director and majority shareholders) namely Yong Loy Huat and Ng Kim Chye for goods sold and delivered. The plaintiff counter-claimed for damages by alleging that the goods sold and delivered by the defendant were defective.

[3] On 17 December 1999, summary judgment was granted against the plaintiff and its guarantors for RM600,658 being part of the defendant's claim in the Kuala Lumpur suit. The plaintiff and its two guarantors filed an appeal to the judge in chambers. On 2 February 2000, the plaintiff and its guarantors applied and obtained a stay of execution of the summary judgment dated 17 December 1999 until after the hearing of the plaintiff's counterclaim. On 11 November 2002, the High Court Judge in KL dismissed the plaintiff's and its guarantors' appeal against the summary judgment. On 9 July 2009, the Court of Appeal dismissed the plaintiff and its guarantors appeal against the summary judgment. On 4 February 2010, the Federal Court dismissed the plaintiff and its guarantors' motion for leave to appeal against the summary judgment. On 18 March 2011, the High Court Judge in Kuala Lumpur allowed the remaining of the defendant's claim against the plaintiff and its two guarantors. The High Court Judge in Kuala Lumpur also dismissed the plaintiff's counterclaim.

[4] On 11 November 2011, the defendant issued a notice of demand under s. 218(1)(e) of the Companies Act 1965 (hereinafter referred to as the said notice) to demand for the payment of the judgment sum under the summary judgment dated 17 December 1999 and the judgment dated 18 March 2011. The said notice was served on the plaintiff on the same day.

[5] Before the expiry of the 21 days stipulated in the notice of demand, the plaintiff through its solicitors had responded to the said notice. The plaintiff also filed this action by originating summon dated 1 December 2011 seeking declaratory reliefs and order for setting aside the said notice. Subsequently, the defendant through its solicitors had presented a winding-up petition dated 14 December 2011 and was registered in this court under Winding-Up No. 28-412-12/2011. Upon the discovery of the winding-up petition, the plaintiff has applied and obtained an interim order dated 4 January 2012 that the defendant is not to take further steps in the winding-up action until the hearing of this action. On 10 January 2012, the plaintiff applied and obtained an order to include the relief that the defendant is restrained from proceeding with the winding-up petition.

The Notice Of Demand Dated 11 November 2011

[6] The plaintiff has disputed the standing of the defendant as a creditor because there has been a change of identity of Megal Pascal Berhad to Mulpha Land Berhad on 7 July 2005 (exh. LM 2), the argument was unsustainable. Section 23(6) of the Companies Act 1965 provides as follow:

> a change of name pursuant to this Act shall not affect the identity of the company or any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced by or against it by its former name may be continued by or against it by its new name.

[7] By virtue of the above section, the change of name of Megal Pascal Berhad to Mulpha Land Berhad would not change the identity of the defendant as a creditor.

[8] Section 121(1A) of the Companies Act 1965 provides that:

> where a company has changed its name pursuant to s. 23, the former name of the company shall also appear beneath its present name on all documents ... for a period of not less than 12 months from the date of change, and if default is made in complying with this subsection the company shall be guilty of an offence against this Act.

[9] The defendant had not complied with the said s. 121(1A) of the said Act and it had not cited its new name in the documents filed in Kuala Lumpur suit after its change of name. However, the non-compliance did not cause any injustice towards the plaintiff. It does not invalidate the winding-up proceedings. Furthermore, the plaintiff *via* its solicitors' letter dated 17 September 2010 forwarded a cheque of RM10,000 to pay the costs awarded by the Federal Court in dismissing the plaintiff and its two guarantors' motion for leave to appeal against the Court of Appeal's decision in affirming the summary judgment after being informed by the defendant's solicitors that the defendant has changed its name from Mega Pascal Berhad to Mulpha Land Berhad (exh. LM-2). It shows that the plaintiff is not confused by the identity of the defendant being the same judgment creditor.

[10] The plaintiff contended that the payment was made without its solicitors' advice. Based upon the careful perusal of the relevant documents exhibited, it shows that the RM10,000 cheque was forwarded *via* the plaintiff's solicitors. The plaintiff cannot now turn around and assert otherwise.

[11] The defendant's solicitor contented that the originating summon filed by the plaintiff because the defendant has already presented its winding-up petition against the plaintiff. The plaintiff relied on the case of *People Realty Sdn Bhd v. Red Rock Construction Sdn Bhd* [2008] 1 CLJ 632, the Court of Appeal at p. 640 stated that:

> In our judgment, once a winding-up petition is filed, the court is precluded from granting an injunction against advertisement or gazettal of the petition.

[12] Once the defendant has rightly proceeded to issue a statutory notice against the plaintiff pursuant to s. 218(2)(a) of the Companies Act 1965 and upon the expiry of 21 days and the judgment debt remaining unpaid, the debt becomes "due and payable". The plaintiff is deemed to be unable to pay its debts. Therefore, the defendant is entitled as of right to present a winding-up petition against the plaintiff.

[13] However, it is settled law that the court has inherent jurisdiction pursuant to O. 92(4) of the Rules of the High Court 1980 to restrain the winding-up proceedings if there is an abuse of process. (*RHB Bank Bhd v. Gunasingam Ramasingam* [2002] 5 CLJ 544, *Zalam Corporation Sdn Bhd v. Dolomite Readymixed Concrete Sdn Bhd* [2011] 9 CLJ 705; [2011] 1 LNS 1021). Bearing that in mind, I shall proceed to examine the merits of this application.

[14] The defendant contended that the winding-up petition was grounded on a valid judgment and its execution of which had not been stayed. After a careful perusal of all affidavits, it is clear that the execution of the summary judgment dated 17 December 1999 was only stayed until the disposal of plaintiff's counter-claim. On 18 March 2011, the defendant's claim was allowed by the Kuala Lumpur High Court and the plaintiff's counter-claim was dismissed. There was no application by the plaintiff to stay the execution pending the disposal of plaintiff's appeal. Eventhough the plaintiff has filed a notice of appeal, this notice, cannot amount to an automatic stay of execution of the judgment. The plaintiff had the opportunity to apply for stay of execution of the judgment dated 18 March 2011 but had not done so. By electing not to do so, the plaintiff must be taken to have waived their rights to a stay of execution of the 18 March 2011 judgment, and they are therefore stopped form now arguing that the enforcement of the judgment should be restrained pending the disposal of the appeal at the Court of Appeal.

[15] The plaintiff claimed that it has shown substantial grounds for disputing the debt giving rise to *bona fide* disputes. The relevant paragraph of the letter dated 25 November 2011 (exh. Y-1, p. 9 of the plaintiff's Affidavit in Support) reads as follow:

> Thirdly, as you aware our client has always dispute your client's claim against our client, and the dispute is continuing in the pending appeal in the Court of Appeal. Until the dispute is finally resolved through the appeal process as available and as taken, our client is entitled to dispute the claim under the section 218 Notice as a debt that remains challengable.

[16] A judgment sum remains due even though the debtor's appeal against the judgment is pending, because an appeal does not operate as a stay of execution. Therefore, the fact that an appeal was filed at the Court of Appeal merely means that the

plaintiff still disputes the debt but does not mean that the debt is *bona fide* disputed. In the case *Bank Utama (Malaysia) Bhd v. GKM Amal Bhd* [2000] 2 CLJ 525, the court stated at p. 528:

> With respect, my understanding of what is meant by a disputed debt in the context of a winding-up petition is that it is a debt in respect of which it is shown, with grounds supported by evidence, that there is a *bona fide* dispute. A debt is not disputed debt in that context simply because the respondent maintains that he disputes the debt. A judgment on the debt establishes in law that there is no *bona fide* dispute as to the debt. The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The fact that the debtor has lodged an appeal against the judgment merely means that he still disputes the debt but does not establish that the debt is *bona fide* disputed. The judgment has already established the contrary.

[17] The plaintiff contended that, by the said letter, the plaintiff has given an undertaking to deposit the judgment sum with its solicitors and the solicitors will give an undertaking to release the monies upon disposal of the appeal against the judgment dated 18 March 2011. However, after a careful perusal of all affidavits affirmed by the plaintiff, and all documents exhibited, there is no documentary evidence that the judgment sum was in fact deposited with the plaintiff's solicitors.

[18] Alternatively, if the plaintiff has indeed deposited the monies with its solicitors, it still does not preclude the defendant from presenting its winding-up petition. In the case of *Zalam Corporation Sdn Bhd v. Dolomite Readymixed Concrete Sdn Bhd* [2011] 9 CLJ 705; [2011] 1 LNS 1021, the Court of Appeal stated at pp. 718-719:

> Kami bersetuju dengan peguam terpelajar defendan pertama bahawa petisyen untuk menggulungkan suatu syarikat berdasarkan kepada suatu penghakiman yang sah bukannya satu penyalahgunaan proses mahkamah. Walaupun dalam kes ini terdapat keterangan yang menunjukkan bahawa plaintif telah mengemukakan jumlah hutang penghakiman itu kepada peguamnya, pada pendapat kami ia tidak mengeluarkan plaintif daripada takrifan 'orang yang tidak mampu membayar hutangnya' di bawah s. 218(2)(a) Akta. Jumlah hutang yang dituntut melebihi RM500 dan plaintif masih mengabaikan pembayaran hutang penghakiman yang dituntut dalam tempoh yang ditetapkan di bawah seksyen itu.

[19] The plaintiff also claimed that it did not know how much it should pay because the judgment given by the Kuala Lumpur High Court against the plaintiff and its two guarantors are jointly and severally liable for the defendant's debts and the judgment dated 18 March 2011 does not state how much the plaintiff should pay. The claim was unsustainable and the defendant is still entitled to present its petition. In the case *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437, the Federal Court at p. 437 stated that:

> A notice of demand under s. 218(2)(a) of the Act need not specify the exact sum due as at the date of the demand. So long as the sum due exceeds RM500 and remains unpaid, after a demand has been made, without a reasonable explanation to the satisfaction of the court, there is 'neglect' to pay such sum within the meaning of the section.

[20] The plaintiff also claimed that the winding-up proceedings will cause the plaintiff lost of reputation and unable to finish the projects it claims to be working on. Such fear could not be a ground to stay the winding-up proceedings. In the case *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380, the Court of Appeal at p. 382 stated that:

> The grounds relied on by the applicant was nothing more than a fear of losing its business, customers, suppliers and goodwill. Also, the applicant feared of not being able to collect its debts from third parties in the event it was wound-up. All that the applicant had to do to avoid such fears was to settle the judgment debt. The winding-up petition was still pending. The applicant still had every opportunity to contest it ... Execution is a natural process after obtaining judgment and winding-up was one of them.

[21] Based upon the above analysis, the complaints advanced by the plaintiff are unsustainable and the application should be dismissed. The battle is not lost as the plaintiff still has every opportunity to contest the winding-up petition at the hearing of the petition.